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Case No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

HARRY K. SINGLETARY, Jr., Secretary,
Florida Department of Corrections,

Petitioner

v.

RICHARD BING GWONG,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the *Ex Post Facto* Clause requires Florida to provide early release to more than 20,000 inmates convicted of violent crimes and sex offenses on the basis of a prison management statute that authorizes grants of "**purely discretionary**" incentive gain-time for good conduct, thereby greatly expanding the rule of *Weaver v. Graham*, 450 U.S. 24 (1981), which held that the *Ex Post Facto* Clause prohibited retroactive application of statutory changes regarding **automatic** grants of **mandatory** gain-time.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of Florida is reported as *Gwong v. Singletary*, __ So. 2d __ , 21 Fla. L. Weekly S430 (Fla. October 10, 1996), and is reprinted in the Appendix to this Petition. [A1-A11].

JURISDICTION

The decision of the Florida Supreme Court was rendered on October 10, 1996. Respondent Singletary's timely Motion for Rehearing, Clarification and Issuance of Order Staying Finality of Opinion Pending Review by the United States Supreme Court was denied in a final opinion issued November 22, 1996. A copy of the motion is reproduced in the Appendix [A32-A36] as well as a copy of the opinion denying rehearing. [A12-A15] This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The opinion below involves the *Ex Post Facto* Clause of Article II, Section 10, of the Constitution for the United States of America, which states in pertinent part that:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts; or grant any Title of Nobility.

STATUTORY PROVISION INVOLVED

In relevant part, section 944.275, Florida Statutes (1985), provides:

> (1) The department [of Corrections] is authorized to grant deductions from sentences in the form of gain-time in order to encourage

satisfactory prison behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services.

. . . .

(4)(b) For each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department **may grant** up to 20 days of **incentive gain-time,** which shall be credited and applied monthly.

. . . .

(5) When a prisoner is found guilty of an infraction of the laws of this state or the rules of the department, gain-time may be forfeited. (emphasis supplied)

The full text of section 944.275, Florida Statutes (1985), is reproduced in the Appendix. [A16-A18].

STATEMENT OF THE CASE

Respondent, Richard "Bing" Gwong (Gwong), is presently serving a 22-year sentence in the custody of the Florida Department of Corrections (FDOC) after being adjudicated guilty of second-degree murder by the Circuit Court in Pinellas County, Florida, for a murder he committed on January 13, 1987. Gwong was originally convicted by a jury of first-degree murder, adjudicated guilty and sentenced to a life term with a minimum mandatory 25 years before becoming eligible for parole. That judgment and sentence were upheld on appeal in *Gwong v. State*, 567 So. 2d 906 (Fla. 2nd DCA 1990). But Gwong's original judgment and sentence were later set aside by the trial court on collateral attack. Gwong then entered a guilty plea to second-degree murder and

was sentenced by the trial court "to the custody of the Department of Corrections [t]o be imprisoned [f]or a term of 22 years," *nunc pro tunc* to his original sentencing date of February 24, 1989, with credit for time served.

Effective April 21, 1996, the FDOC adopted the amendment to the administrative rule in question, which implemented a statute providing that FDOC "**may grant** [to qualifying inmates] up to 20 days of incentive gain-time, which shall be credited and applied monthly." (emphasis supplied) § 944.275(4)(b), Fla. Stat. (1985). FDOC, by this rule amendment, determined it would no longer grant incentive gain-time to specified violent felony offenders and sex offenders who have served less than 85% of their sentences. The amendment, however, canceled no incentive gain-time credits granted to inmates prior to its effective date. The entire text of Rule 33-11.0065, Florida Administrative Code, with the text of the 1996 amendment in italics, is reproduced in the Appendix to this Petition. [A19-A31].

On April 29, 1996, Gwong filed a Petition for Writ of Mandamus in the Supreme Court of Florida. The Petition alleged that this administrative rule amendment violated the *Ex Post Facto* Clause of the United States Constitution because it prevented Gwong from being eligible "to earn up to 20 days each month of incentive gain-time -- and thereby substantially shorten his actual period of incarceration."

On October 21, 1996, the Florida Supreme Court issued its decision on the administrative rule amendment, finding in favor of Gwong. Citing to this Court's opinions in *Weaver v. Graham*, 450 U.S. 24, (1981), *California Department of Corrections v. Morales*, __ U.S. __,115 S. Ct. 1597, (1995) and *Collins v. Youngblood*, 497 U.S. 37 (1990), the Florida Supreme Court held:

> Given that the amendment (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of certain inmates to earn incentive gain-time credits, we are compelled to conclude that it violates the ex post facto prohibition.

[A10].

On November 22, 1996, the Florida Supreme Court issued an opinion denying Petitioner's motion for rehearing and stay, taking pains to point out that under its reading of *Weaver v. Graham* it had no choice but to find in Gwong's favor. The court explained:

> It is very clear that the holding of the United States Supreme Court in *Weaver* is still the law of the land, whether we like it or not. We can neither ignore nor avoid the express dictates of the United States Supreme Court in its holding in *Weaver*.

[A13].

REASON FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED SO THIS COURT MAY 1) RESOLVE THE CONFLICT BETWEEN ITS MOST RECENT *EX POST FACTO* OPINIONS AND THE DECISION BELOW, 2) DETERMINE IF *WEAVER V. GRAHAM* SHOULD BE EXTENDED TO BAR PROSPECTIVE CHANGES IN HOW DISCRETION MAY BE EXERCISED UNDER WHAT *WEAVER* ITSELF CHARACTERIZED AS A "PURELY DISCRETIONARY" STATUTE, AND 3) LIMIT PRESENT CONFUSION FACED BY LOWER COURTS WHEN CONFRONTING THE TENSION BETWEEN *EX POST FACTO* LIMITATIONS TO CRIMINAL SENTENCING AND THE RIGHT OF STATES TO MANAGE THEIR PRISONS.

If the opinion below is not a correct extension of *Weaver v. Graham*, 450 U.S. 24 (1981), Florida will needlessly suffer a significant adverse impact caused by the forced early release of more than 20,000 inmates, -- including convicted murderers, kidnappers, rapists and pedophiles -- and forfeit flexibility in managing its prisons. [A5]. Florida, therefore, seeks to have this Court determine whether the rule announced in *Weaver v. Graham,* 450 U.S. 24 (1981), extends to discretionary incentive gain-time, and in particular to an administrative rule limiting the ability of inmates to accrue incentive gain-time in the future.[1] This is a question of great importance to all states.

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[1] *Lynce v. Mathis*, Case No 95-7442, argued November 4, 1996, deals with provisional credits, also referred to as "overcrowding" credits and "administrative gain-time." This

As the instant case demonstrates, *Weaver* continues to confuse both state and federal courts regarding the applicability of the *ex post facto* prohibition to prison management laws and regulations far removed from the imposition of a criminal sentence -- e.g., discretionary incentive gain-time -- and consequently has compromised the states' management ability to adapt to changing circumstances.

On its face, *Weaver* appears to uphold the fundamental concept that a state, consistent with the *Ex Post Facto* Clause, may not retrospectively apply a law that, to the detriment of a criminal defendant, directly affects a sentence at the time the sentence is imposed. This Court held there that Florida could not retroactively apply a change to its mandatory gain-time statute to inmates who had committed their crimes before the effective date of the change because the statute provided that "an inmate is **automatically entitled** to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks." (emphasis supplied) 450 U.S. at 35. The mandatory statutes involved in *Weaver* were section 944.27, Florida Statutes (1975),[2] and section 944.275(1), Florida

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Court's decision in that case could bear on this one.

[2] In pertinent part, § 944.27, Florida Statutes (1975), provided:

(1) The [Department of Offender Rehabilitation] **shall grant** the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth days of his sentence;

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he **shall be entitled to such credit** for a month as soon as

Statutes (1979).[3] In other words, mandatory gain-time was a sentencing consideration precisely because it was compulsory and could, in a specifically quantifiable manner, be relied upon by a criminal defendant as a guaranteed means of shortening a sentence. Effectively it was an automatic credit.

Weaver specifically and clearly distinguished the mandatory and automatic form of gain-time directly involved there from the statutory predecessor to the present incentive gain-time found in then subsections 944.275(2) and (3), Florida Statutes (1979). *Id.* at 450 U.S. 34, 35. *Weaver* observed that "the award of extra gain time [under these later statutory provisions] is **purely discretionary, contingent on** both **the wishes of the correctional authorities** and special behavior by the inmate." (emphasis supplied) *Id.* at 450 U.S. 35. The administrative rule here at issue was adopted under the current version of these statutes.

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he has served such time as, when added to the deduction allowable, would equal a month. (emphasis supplied)

[3] The amended statute, § 944.275(1), Florida Statutes (1979), provided that:

(1) The department **shall grant** the following deductions for gain-time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all successive years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month. (emphasis supplied)

Ignoring *Weaver*'s characterization of discretionary incentive gain-time statutes, the Eleventh Circuit Court of Appeals determined that *Weaver* barred prospective changes in them, stating in *Raske v. Martinez*, 876 F.2d 1496, 1500 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989):

> Thus, even though the opportunity to earn incentive gain time is dependent on the grace of the legislature and the availability of jobs, we conclude that if the State affords its inmates such work, it is bound to reward prisoners for their services at a gain time rate at least equally advantageous to that in effect at the time of those prisoners' offenses.

The Supreme Court of Florida accepted and adopted *Raske,* likewise holding that *Weaver* governed discretionary incentive gain-time. *Waldrup v. Dugger*, 652 So. 2d 687 (Fla. 1990). Both *Raske* and *Waldrup* rejected *Weaver*'s language and Florida's argument making clear that discretionary incentive gain-time -- being granted at the discretion of FDOC ("the wishes of the correctional authorities") for good behavior after incarceration -- is inherently different than mandatory gain-time.

Weaver did not make clear whether it considered mandatory gain-time to be part of the sentence ("[w]e need not determine whether the prospect of the gain time was in some technical sense part of the sentence," 450 U. S. 32). Rather, it based its holding that the *Ex Post Facto* Clause had been violated on its conclusion that the prisoner had been "disadvantaged" by the statutory change. *Id.* at 450 U.S. 34. However, in *California Dept. of Corrections v. Morales*, _ U.S. ___, 115 S. Ct. 1597, 1601 (1995), this Court closely examined the common *ex post facto* thread running through the

"trilogy of cases" comprised of *Lindsey v. Washington*, 301 U.S. 397 (1937); *Weaver v. Graham*; and *Miller v. Florida*, 482 U.S. 423 (1987), and expressly rejected their reliance on whether the statutes there involved "operate to the 'disadvantage' of covered offenders." Id. __ U.S. __, 115 S. Ct. at 1602, n. 3.

The *Morales* Court began its analysis of the *Lindsey*, *Weaver* and *Miller* trilogy by reaffirming "that the *Ex Post Facto* Clause incorporated 'a term of art with an established meaning at the time of the framing of the Constitution.'" *Id.* 115 S. Ct. at 1601. Then the Court found that, in each of those three cases, the statute in question directly affected the criminal sentence at the time the sentence was imposed. *Id.* The *ex post facto* violation in *Lindsey* arose when a law enacted after the commission of the crime replaced the sentencing judge's option of an indeterminate sentence "of not more than 15 years" with a mandatory 15-year sentence. *Id.* The *ex post facto* infirmity in *Miller* was a post-crime statutory modification that altered "the substantive 'formula' used to calculate the applicable sentencing range" at the time of sentencing. *Id.* The *Morales* Court treated *Weaver* as a sentencing case, finding that, because the challenged gain-time statute called for "**mandatory reductions** to the terms of all prisoners who complied with certain prison regulations and state laws . . . . it effectively eliminated the lower end of the possible range of prison terms." (emphasis supplied) *Id.*

Morales reiterated this Court's return to a traditional view of the *ex post facto* prohibition, that is, one without the "disadvantaged offender" test featured in the "trilogy of cases." The Court there stated:

> Our opinions in *Lindsey*, *Weaver* and *Miller* suggested that enhancements to the measure of

> criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See *Lindsey*, 301 U.S., at 401, 57 S. Ct., at 799; *Weaver*, 450 U.S., at 29, 101 S. Ct., at 964; *Miller*, 482 U.S., at 433, 107 S. Ct., at 2452-53. But the language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 2718, 111 L. Ed.2d 30 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "*opportunity* to take advantage of provisions for early release," see *post*, at 1607, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Id. at 1602, n. 3.

The *Morales* conclusion that the mandatory gain-time statute addressed in *Weaver* was an integral part of the sentence follows from its mandatory, automatic nature. The moment Weaver was sentenced, he could readily calculate the **maximum** amount of time he would spend in prison (with good conduct) by simply deducting all mandatory gain-time from his sentence, as FDOC was required to do by statute. See §944.27, Fla. Stat. (1975). This automatic reduction of his sentence was the "lower end of the possible range of prison terms" referred to in *Morales*. Then, after Weaver entered prison, that automatic reduction was statutorily altered -- **increasing** the upper limit of his sentence -- when the Florida

Legislature reduced mandatory gain-time awards.[4] See §944.275(1), Fla. Stat. (1979).

The administrative rule involved here did not similarly impact Gwong. At the time of his sentencing, Gwong could easily calculate the automatic reduction in his sentence by deducting from that sentence all mandatory gain-time, called "basic gain-time" in subsection 944.275(4)(a), Florida Statutes (1985).[5] Appendix [A17]. However, Gwong could not perform such a calculation with respect to prospective incentive gain-time precisely because it was not part of his sentence. Rather, incentive gain-time was a contingency governed entirely by FDOC's prison management decisions and Gwong's personal behavior. *Weaver's* characterization of incentive gain-time as "purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate," *Weaver* at 450 U.S. 35, itself put Gwong on notice that he had **no expectation** of receiving grants of incentive gain-time.

In deciding *Waldrup v. Dugger*, the Florida Supreme Court, following the lead of the Eleventh Circuit Court of Appeal in *Raske,* while ignoring *Weaver*'s own characterization of incentive gain-time, did not have this Court's guidance in

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[4] By deducting the mandatory gain-time automatically granted by statute, Weaver's 15-year sentence was instantaneously reduced to slightly less than 11 years in prison at the time it was imposed by the trial court. Subsequent statutory changes to mandatory gain-time would have raised that period by more than two years. *Weaver* 450 U.S. at 27, n. 6.

[5] By deducting the mandatory ten days of basic gain-time automatically granted by statute for every month of the sentence, Gwong's 22-year sentence was instantaneously reduced by one-third at the time it was imposed by the trial court.

Morales and *Collins* that "disadvantage" to the offender is no longer the test for an *ex post facto* violation. But in the instant case, the court below also disregarded *Collins'* and *Morales'* rejection of an inmate's diminished "opportunity" for early release as a consideration in an *ex post facto* inquiry. In its original opinion in the instant case, the Florida Supreme Court held:

> Given that the amendment (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) **acts to enhance the measure of punishment because it eliminates the ability of certain inmates to earn incentive gain-time credits**, we are compelled to conclude that it violates the ex post facto prohibition. (emphasis supplied)

[A10]. The highlighted words mirror the reasoning of the **dissent** in *Morales*.

The court below had obvious difficulty separating criminal sentencing considerations from prison management issues for the purpose of conducting an *ex post facto* inquiry. The court's struggle is representative of the confusion confronting state and federal courts throughout the land when they attempt to apply the dictates of *Weaver* to prison management laws and regulations.

For example, some courts focus on whether the law or regulation under review adds additional time to the sentence, and, if not, they find no constitutional violation. See *U.S. v. Reese*, 71 F.3d 582 at 590 (6th Cir. 1995) (after acknowledging conflict with three other circuits, the court held that a new sentencing statute increasing the amount of prison time to be imposed upon an inmate who violates conditions of supervised

release does not violate the *ex post facto* prohibition because the inmate received fair notice of the new law and it did not increase his original sentence); and *Ewell v. Murray*, 11 F.3d 482 at 486 (4th Cir. 1993), *cert. denied*, __ U.S. _ (1994), (new regulations by Virginia's Department of Corrections taking away an inmate's good conduct credits for refusal to provide blood samples to a DNA data bank do not violate the *ex post facto* prohibition because "[t]he punishment does not add punishment for the original crime for which the inmate was incarcerated"*)*.[6] Other courts, though, look to total time in incarceration to determine whether an *ex post facto* violation has occurred -- with predictable results. See *Barger v. Peters*, 645 N.E. 2d 175 at 177 (Ill. 1994), *cert. denied*, __U.S. _ (1995) (a new statute precluding inmates convicted of specified violent crimes and sex offenses from accruing new good-conduct credits violates *ex post facto* prohibition because the United States Supreme Court "construes punishment to mean the actual time that [an inmate] spends in prison"); *Williams v. Lee*, 33 F.3d 1010 (8th Cir. 1994), *cert. denied*, __ U.S. __, 131 L. Ed. 2d 244, (a new statute allowing revocation of an inmate's accumulated good-time credits for violating parole by committing new crime was found to violate the *ex post facto* prohibition because, by authorizing reinstatement of inmate's original sentence, the new law increased inmate's punishment).[7]

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[6] See also *Dominique v. Weld*, 73 F.3d 1156, 1163 (1st Cir. 1996) (a new state regulation prohibiting certain inmates convicted of sex offenses from participating in work release -- thereby causing petitioner to lose his work release privileges -- does not violate the *ex post facto* prohibition because "[t]he change does not affect the length of Dominique's sentence or his parole options").

[7] See also *Ekstrand v. State*, 791 P.2d 92, 95 (Okl.Cr. 1990) (a statutory amendment lowering the amount of reduction credits granted to inmates to shorten their sentences violates the *ex post facto* prohibition when applied to inmates who were convicted of crimes occurring before its

On its face, section 944.275(4)(b), Florida Statutes (1985), is an administrative prison management statute that is wholly removed from the criminal law and is not penal, for it does not inflict punishment. It adds not a day to Gwong's sentence, which is the "quantum of punishment attached to the crime." *Dobbert v. Florida*, 432 U.S. 282 (1977). As stated by this Court in *Trop v. Dulles*, 356 U.S. 86, 95 (1958):

> In deciding whether or not a law is **penal**, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment--that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. (emphasis supplied)

Under traditional *ex post facto* scrutiny, subsection 944.275(4)(b), Florida Statutes (1985), cannot be included in the "substantive 'formula' used to calculate the applicable sentencing range." *Morales,* 115 S. Ct. at 1601. That is because: 1) this is a remedial statute, not a criminal or penal law; 2) the statute does not directly affect a criminal sentence at the time the sentence is imposed; 3) the statute unmistakably gives FDOC the discretion to grant, or not, incentive gain-time deductions to inmates; 4) the sentencing court, the prosecution

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effective date because "this reduction lengthens the period that someone in petitioner's position must spend in prison").

and Gwong all had "fair warning"[8] that incentive gain-time was discretionary and should not be included in the sentencing calculus; and 5) this administrative prison management statute is well within the scope of Florida's legitimate penological interests.

To this day, Gwong's sentence for second-degree murder remains unchanged at 22 years. It is Gwong's sentence -- not a possible opportunity to receive early release from prison via incentive gain-time -- that is attached to the crime and protected from legislative tampering by the *Ex Post Facto* Clause. As originally stated by this Court in *Hopt v. Utah*, 110 U.S. 574, 589-590 (1884), and quoted with approval nearly a century later in *Dobbert*, 432 U.S. at 295 (1977):

> The crime for which the present defendant was indicted, the **punishment prescribed therefor**, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. (emphasis supplied)

Substituting "rule amendment" for "statute," the same can be said for Gwong.

The Decision Below Unnecessarily Infringes on Florida's Right to Manage Its Prisons

When reviewing prison rules and regulations such as the one at issue here, this Court accords great deference to

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[8] As noted in *Weaver*, 450 U.S. at 28, 101 S. Ct. at 964: "Through this [*ex post facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."

decisions of prison administrators. *Lewis v. Casey*, 518 U.S. __, 116 S. Ct. 2174 (1996); *Thornburgh v. Abbott*, 490 U.S. 402 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987). In particular, the *Turner* Court noted that prison administration is the responsibility of the legislative and executive branches of government and that "separation of powers concerns counsel a policy of judicial restraint" in such matters. *Id.* 482 U.S. at 85. The Court then held that:

> [W]hen a prison regulation impinges on inmates' constitutional rights, **the regulation is valid if it is reasonably related to legitimate penological interests**. In our view, such a standard is necessary if prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." *Jones v. North Carolina Prisoners' Union*, 433 U.S., at 128, 97 S. Ct., at 2539. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. (emphasis supplied)

Id. 482 U.S. at 89.

In Florida, incentive gain-time is simply a remedial, administrative prison management tool created by the Legislature and used by FDOC to 1) promote order and rehabilitation by inducing good behavior from inmates, 2) maximize internal security, and 3) achieve the highest and best use of limited prison beds by holding the most dangerous offenders longer while lesser offenders gain earlier release. All

of these objectives are legitimate penological interests of the state. *Procunier v. Martinez*, 416 U.S. 396 (1974) (a state has a substantial governmental interest in security, order and rehabilitation inside prisons); *Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("central to all other correctional goals is the institutional consideration of internal security within the corrections facilities themselves"); and *Shifrin v. Fields*, 39 F.3d 1112 at 1114 (10th Cir. 1994) (a state's decision to withhold emergency time credits from violent or repeat offenders is "rationally related to legitimate penological concerns").

Without question, the Florida Legislature intended that Petitioner, a correctional professional, exercise his best professional judgment and discretion when adopting the administrative rules setting forth how FDOC would grant gain-time to deserving inmates.[9] The rule amendment in question implements the discretionary, remedial statute, subsection 944.275(4)(b), Florida Statutes (1985), in effect when Gwong committed his crime.

Under the collective reasoning of *Lewis*, *Thornborough*, *O'Lone* and *Turner*, cited above, Florida's legitimate penological interests in the mechanics of granting incentive gain-time are all the more compelling since neither Gwong nor a similarly situated inmate has a constitutional right that is affected by FDOC's policy decision to prohibit these inmates from accruing additional incentive gain-time. The court below erred by unnecessarily trespassing on Florida's right to properly manage its prisons.

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[9] Under the Florida Administrative Procedures Act, an agency policy of general applicability must be set forth in an administrative rule. Chapter 120, Florida Statutes.

CONCLUSION

This Court should grant certiorari and quash the opinion below or, in the alternative, remand this case to the Supreme Court of Florida for reconsideration in light of this Court's anticipated ruling in *Lynce v. Mathis, et al.* No. 95-7542, argued November 4, 1996.

RESPECTFULLY SUBMITTED,

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

HARRY K. SINGLETARY, Jr., Secretary,
Florida Department of Corrections,

Petitioner

v.

RICHARD BING GWONG,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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Supreme Court of Florida

No. 87,824

RICHARD BING GWONG,
Petitioner,

vs.

HARRY K. SINGLETARY, JR., etc.,
Respondent.

[October 10, 1996]

OVERTON, J.

We have for review Richard Bing Gwong's petition for writ of mandamus, in which he asks this Court to require the Florida Department of Corrections (the department) to make incentive gain-time available to certain inmates currently being denied eligibility for such gain-time by Florida Administrative Code Rule 33-11.0065 (1996). We have jurisdiction. Art. V, § 3(b)(8), Fla. Const. The rule amendment contested by Gwong retroactively denies to certain prisoners, who have 85% or less of their prison sentences remaining, the ability to earn

incentive gain-time. For the reasons expressed, we find that the United States Supreme Court's opinion in Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), and our opinion in Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990), mandate that we grant the petition.

Gwong is currently serving a twenty-two-year sentence imposed as a result of his second-degree murder conviction for a homicide committed on January 13, 1987. He was sentenced on February 24, 1989. He has less than 85% of his sentence remaining. On the date that Gwong committed his offense, the law provided that he was eligible to earn incentive gain-time.[1] Specifically, section 944.275(4)(b), Florida Statutes (1985),[2] stated:

> For each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly.

---

[1]Inmates convicted of offenses committed between July 1, 1978, and June 14, 1983, are eligible to receive work and extra gain-time under the prior provisions of section 944.275(2)(b) and (3)(a), Florida Statutes (1979). In 1983, the legislature simplified the gain-time statute and replaced the terms "work" and "extra" gain-time with the term "incentive" gain-time. § 944.275(4)(b), Fla. Stat. (1983). In this opinion, we collectively refer to all three types of gain-time as incentive gain-time.

[2]Section 944.275 was amended in 1993 and 1995 to alter the amount of gain-time the department is authorized to award. Those amendments are not applicable to Gwong given that his crime was committed before the effective dates of those amendments. See Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990).

In 1996, the Attorney General issued an opinion concluding that the department could exercise its "discretion" under the statute by adopting a rule that prohibited certain classes of inmates from receiving incentive gain-time. Op. Att'y Gen. Fla. 96-22 (1996). Based on this opinion, the department amended rule 33-11.0065, effective April 21, 1996, to read in pertinent part as follows:

(1) Ineligibility.

(a) No inmate shall receive or accumulate incentive gain time:

. . .

6. If convicted of any of the following offenses committed before October 1, 1995 and has 85% or less of any sentence remaining to be served. The provisions of (1)(a)6. shall also apply to work, extra and constructive gain time for inmates convicted of offenses committed between July 1, 1978 and June 14, 1983. The provisions of (1)(a)6. shall not apply to educational gain time under s. 944.801, F.S., or to meritorious or educational achievement incentive gain time.

a. Is convicted or has been previously convicted, of committing or attempting to commit sexual battery or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

b. Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery or aggravated battery, and a sex act was attempted or completed during commission of the offense;

c. Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping;

d. Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse; sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;

e. Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction; or

f. Is convicted or has been previously convicted of committing or attempting to commit offenses under s. 827.03, 827.071(2) or (3) or 847.0145, Florida Statutes.

g. Is convicted or has been previously convicted of conspiracy or solicitation to commit any offense listed in a. through f. above.

(Amendment emphasized by underlining.) Through this amendment, the department has implemented the "85% rule" for certain classes of prisoners based on its discretionary authority under the statute. The department has determined that any defendant who has been convicted of any offense set forth in subsection (1)(a)6.a.-g. and who has 85% or less of any sentence remaining to be served, shall be ineligible to receive incentive gain-time. The department has advised the Court that more than 20,000 inmates are immediately impacted by this amendment to the rule.

Gwong alleges that the amendment violates the prohibition against ex post facto laws contained in article I, section 10, clause 1, of the United States Constitution.[3] Based on his assertions, he asks this Court to issue a writ of mandamus ordering the department to make incentive gain-time available to him as it existed at the time he committed his offense.

In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable. California Dep't of Corrections v. Morales, 115 S. Ct. 1597, 131 L. Ed 2d 588 (1995). In

---

[3]Article I, section 10, clause 1 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

(Emphasis added.)

applying this test to the instant case, we are presented with nearly the identical situation we evaluated in Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990). In Waldrup, the prisoner had been sentenced for crimes committed in 1980 and 1982. In 1983, the legislature amended section 944.275 to decrease the possible award of incentive gain-time, which, in turn, had the effect of possibly increasing the prisoner's sentence. We first concluded that the change in the statute operated retrospectively because it applied to a large class of inmates whose offenses occurred before its effective date. Under the second prong, we concluded that the statute was ex post facto because it was more onerous than the law in effect on the date of the offense. See Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). This was true even though a prisoner had but a "mere expectancy" in the availability of incentive gain-time. 450 U.S. at 30 (a law need not impair a "vested right" to violate the ex post facto prohibition; it need only make the punishment more onerous than the law in effect at the time the offense was committed). This is because "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." 450 U.S. at 32. Like the situation in both Waldrup and Weaver, the instant rule amendment (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of an inmate to earn incentive gain-time credits.

In comparing the instant case to Waldrup and Weaver, we note that the United States Supreme Court has somewhat altered the second prong from how it was set forth in those cases. See Morales; Collins v. Youngblood, 497 U.S. 37, 100 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). In Weaver, the Court concluded that a law violated the ex post facto clause if it

retrospectively "disadvantaged" a prisoner. In Waldrup, we applied this same terminology. In Collins, however, the United States Supreme Court stated that a law is ex post facto if it punishes as a crime an act previously committed which was innocent when done, makes more burdensome the punishment for a crime after its commission, or deprives one charged with a crime of any defenses available according to the law at the time the act was committed. In Morales, the Court subsequently concluded that a law must do more than simply "disadvantage" an inmate to violate the ex post facto clause. The Court stated that a law violates the ex post facto clause if it (1) operates retrospectively and (2) alters the definition of criminal conduct or increases the penalty by which a crime is punishable as set forth in Collins. Morales, 115 S. Ct. at 1602 n.3. The Court noted, however, that, in situations like those at issue in Weaver, the clause was violated because the new law enhanced the measure of punishment by altering the available gain-time. Id. at 1601-02. Likewise, the rule amendment in the instant case, as did the statute in Waldrup, retrospectively enhances the measure of punishment by altering the available gain-time.

The department argues that Waldrup and Weaver are distinguishable because they both deal with changes in the law, whereas here we are confronted with a change in an administrative rule. The department maintains that the amendment is merely a policy decision, which is being instituted under the broad grant of discretion awarded to the department under the statute. According to the department, awards of incentive gain-time are totally within its discretion and nothing in the statute prohibits it from making distinctions among inmates. In fact, the department maintains that nothing in the statute mandates that it exercise its discretion at all. Thus, the department contends that the ex post facto clause is

not implicated. In furtherance of its position, the department points to this Court's opinion in Waldrup, in which we stated:

> Nothing in this opinion, however, shall be read as restricting the discretion accorded [the department] under the earlier incentive gain time statutes. This discretion remains intact. If [the department] withholds all or some of the incentive gain time available to Waldrup or similarly situated inmates under the earlier statutes, then [the department's] actions cannot be challenged unless they constitute an abuse of discretion.

562 So. 2d at 692-93. The department also contends that the United States Supreme Court's recent opinion in Morales and the Eleventh Circuit Court of Appeal's opinions in Conlogue v. Shinbaum, 949 F.2d 378 (11th Cir. 1991), and Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984), provide that an administrative rule implemented in furtherance of a department's discretion does not implicate the ex post facto clause. We disagree.

First, the department misconstrues the above-quoted portion of our opinion in Waldrup. In that case, we were emphasizing that, although the amendments could not be retrospectively applied, the department could still properly deny gain-time to those inmates whom it found, in its discretion, did not qualify for gain-time because of unsatisfactory work or improper conduct. In no way did we intend for our language in that opinion to provide the department with the authority to completely refuse to exercise its discretion at all for certain categories of prisoners. As the Eleventh Circuit Court of Appeals stated in Raske v. Martinez, 876 F.2d 1496 (11th Cir.), cert. denied, 493 U.S. 993, 110 S.

Ct. 543, 107 L. Ed. 2d 540 (1989), the discretion afforded the department is not absolute. For example, a prisoner who has performed his work in an outstanding manner cannot legally be denied incentive gain-time for that work, despite the discretion afforded the department. Id. at 1499 n.6. In other words, "the department is the judge of whether [the conditions set forth in the statute] have been met." Id. at 1499.

Further, the facts of the instant case are distinguishable from those in Paschal and Morales. In those cases, it was determined that the parole procedures could be amended because they merely altered the method to be followed in fixing a parole date. Here, the procedure for implementing the award of gain-time has not merely been altered; it has been changed to completely eliminate the ability of certain classes of inmates to receive gain-time even if they carry out their work in an outstanding manner as provided by the statute.

The rule is likewise distinguishable from the regulation at issue in Conlogue. In that case, an administrative regulation was promulgated setting forth the basis for determining a prisoner's eligibility for incentive good time, which is similar to the gain-time at issue. The regulation in effect at the time the inmate committed his crime provided that any inmate whose psychological or sociological profile contraindicated an early release back to society would not receive the gain-time. After the inmate was incarcerated, the following provision was added to the regulation: "Since criminal record is an important element of sociological profile, repeated convictions for violent crimes against persons may be a contraindication to award of [gain-time] status." 949 F.2d at 380. The Eleventh Circuit found that the amendment was properly adopted because it was merely a procedural amendment, which provided a more refined definition for the terms "psychological or sociological profile." In fact, the Eleventh Circuit specifically distinguished

the case from that in Weaver by finding that the regulation at issue did not involve a Weaver- type regulation that drastically reduced the gain-time an inmate could earn. Conlogue, 949 F.2d at 381 n.9.

By amending the rule, the department seeks to do what the legislature cannot even though the department itself is created by the legislature and acts in a quasi-legislative capacity. As the department conceded at oral argument, if the legislature had passed a statute retrospectively eliminating Gwong's eligibility for incentive gain-time, the statute would violate the ex post facto clause. Simply because the amendment is an administrative regulation rather than a law does not alter the application of the ex post facto clause. Such an argument fails to "acknowledge that it is the effect, not the form, of the law that determines whether it is ex post facto." Weaver, 450 U.S. at 31.

Given that the amendment (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of certain inmates to earn incentive gain-time credits, we are compelled to conclude that it violates the ex post facto prohibition.

Accordingly, for the foregoing reasons, we grant Gwong's petition, holding that upon this opinion's becoming final, the department shall be barred from applying the amendment to inmates convicted of offenses occurring before its effective date. Consistent with this opinion, we also disapprove Attorney General Opinion 96-22. Because we trust that the department will fully comply with the dictates of this opinion, we withhold issuance of the writ.

It is so ordered.

KOGAN, C.J., and SHAW, GRIMES, HARDING and ANSTEAD, JJ., concur.
WELLS, J., concurs in result only.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Mandamus

Baya Harrison, III, Monticello, Florida,

for Petitioner

Louis A. Vargas, General Counsel and Susan A. Maher, Deputy General Counsel, Department of Corrections, Tallahassee, Florida,

for Respondent

Robert A. Butterworth, Attorney General; and Jason Vail and Joslyn Wilson, Assistant Attorneys General, Tallahassee, Florida,

for Amicus Curiae, the Office of the Attorney General

Supreme Court of Florida

No. 87,824

RICHARD BING GWONG, Petitioner,

vs.

HARRY K. SINGLETARY, JR., etc.,
Respondent.

ON REHEARING

[November 22, 1996]

OVERTON, J.

We deny rehearing.

In our 1979 decision in Harris v. Wainwright, 376 So. 2d 855 (Fla. 1979), we expressly adopted the view asserted by the State of Florida and rejected a prisoner's claim that the ex post facto clause prohibited the State from retroactively applying a more restrictive gain-time statute even though the statute had the effect of lengthening the defendant's sentence. In Harris, consistent with the State's position, we held that gain-time

statutes were a matter of legislative or executive grace and that the ex post facto clause was inapplicable. On the same date that we issued our opinion in Harris, we summarily denied the petition for writ of habeas corpus filed in Weaver v. Graham, 376 So. 2d 855 (Fla. 1979), relying on our decision in Harris.

The United States Supreme Court then unanimously reversed our decision in Harris in Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). It rejected the grace theory and held that changes, such as those at issue, in incentive gain-time statutes result in an increase in the inmate's penalty, and, consequently, violate the ex post facto clause. While the United States Supreme Court did somewhat alter the standard for reviewing ex post facto cases in California Department of Corrections v. Morales, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), the Court specifically upheld the result it reached in Weaver. It is very clear that the holding of the United States Supreme Court in Weaver is still the law of this land, whether we like it or not. We can neither ignore nor avoid the express dictates of the United States Supreme Court in its holding in Weaver.

In the State's petition for rehearing, it requests that we issue an order indefinitely staying the finality of our opinion in this cause pending review by the United States Supreme Court, on the basis that the Court has granted review in Lynce v. Mathis, 116 S. Ct. 1671 (1996)(order granting certiorari). According to the State, the State is asking the United States Supreme Court in Lynce to revisit and recede from its decision in Weaver. Granting the requested stay would allow the Department of Corrections to continue implementing the administrative rule that, under the United States Supreme Court's decision in Weaver, is clearly unconstitutional. In examining the State's request, it is important to note that the type of gain time being reviewed in Lynce is significantly

different from that at issue here. In Lynce, the issue involves the ex post facto clause as it applies to administrative gain time and provisional credits. The decision in the instant cause involves incentive gain time. These are two distinct types of gain time. We have both explained the different types of gain time and held that administrative gain time and provisional credits are awarded solely for the administrative convenience of the Department of Corrections to alleviate prison overcrowding and are in no way tied to the overall length of an inmate's sentence; consequently, the ex post facto clause does not apply. Dugger v. Grant, 610 So. 2d 428 (Fla. 1992); Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991), cert. denied, 502 U.S. 1037, 112 S. Ct. 886, 116 L. Ed. 2d 790 (1992); and Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988). Incentive or earned gain-time credits, on the other hand, involve quantifiable elements of the length of a prisoner's sentence and are the type of gain time involved in Weaver.

The United States Supreme Court's decision in Weaver is presently the law and, consequently, we are compelled to deny the State's request for an indefinite stay pending that Court's decision in Lynce. Because we trust that the department will fully comply with the dictates of this opinion, we withhold issuance of the writ.

It is so ordered.

KOGAN, C.J., and SHAW, GRIMES and WELLS, JJ., concur.
HARDING and ANSTEAD, JJ., concur in result.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Original Proceeding - Mandamus

Baya Harrison, III, Monticello, Florida,

for Petitioner

Louis A. Vargas, General Counsel and Susan A. Maher, Deputy General Counsel, Department of Corrections, Tallahassee, Florida; and Robert A. Butterworth, Attorney General; Marty E. Moore, Deputy General Counsel; and Jason Vail and Joslyn Wilson, Assistant Attorneys General, Tallahassee, Florida,

for Respondent

944.275 Gain time. --

(1) The department is authorized to grant deductions from sentences in the form of gain-time in order to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services.

(2)(a) The department shall establish for each prisoner sentenced to a term of years a "maximum sentence expiration date," which shall be the date when the sentence or combined sentences imposed on a prisoner will expire. In establishing this date, the department shall reduce the total time to be served by any time lawfully credited.

(b) When a prisoner with an established maximum sentence expiration date is sentenced to an additional term or terms without having been released from custody, the department shall extend the maximum sentence expiration date by the length of time imposed in the new sentence or sentences, less lawful credits.

(c) When an escaped prisoner or a parole violator is returned to the custody of the department, the maximum sentence expiration date in effect when the escape occurred or the parole was effective shall be extended by the amount of time the prisoner was not in custody plus the time imposed in any new sentence or sentences, but reduced by an lawful credits.

(3)(a) The department shall also establish for each prisoner sentenced to a term of years a "tentative release date" which shall be the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited as described in this section. The initial tentative release date shall be determined by deducting basic gain-time granted from the maximum sentence expiration date. Other gain-time shall be

applied when granted or restored to make the tentative release date proportionately earlier; and forfeitures of gain-time, when ordered, shall be applied to make the tentative release date proportionately later.

(b) When an initial tentative release date is reestablished because of additional sentences imposed before the prisoner has completely served all prior sentences, any gain-time granted during service of a prior sentence and not forfeited shall be applied.

(c) The tentative release date may not be later than the maximum sentence expiration date.

(4)(a)As a means of encouraging satisfactory behavior, the department shall grant **basic gain-time** at the rate of 10 days for each month of each sentence imposed on a prisoner, subject to the following:

1. Portions of any sentences to be served concurrently shall be treated as a single sentence when determining basic gain-time.

2. Basic gain-time for a partial month shall be prorated on the basis of a 30-day month.

3. When a prisoner receives a new maximum sentence expiration date because of additional sentences imposed, basic gain-time shall be granted for the amount of time the maximum sentence expiration date was extended.

(b) For each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant up to 20 days of **incentive gain-time**, which shall be credited and applied monthly.

(c) An inmate who performs some outstanding deed, such as saving a life or assisting in recapturing an escaped inmate, or who in some manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence may be granted **meritorious** gain-time of from 1 to 60 days.

(5) When a prisoner is found guilty of an infraction of the laws of this state or the rules of the department, gain-time may be forfeited according to law.

(6)(a) Basic gain-time under this section shall be computed on and applied to all sentences imposed for offenses committed on or after July 1, 1978.

(b) On the effective date of the act, all incentive and meritorious gain-time shall be granted according to the provisions of this act.

(c) All additional gain-time previously awarded under former subsections (2) and (3) and all forfeitures ordered prior to the effective date of this act shall remain in effect and be applied in establishing an initial tentative release date.

(7) The department shall promulgate rules to implement the granting, forfeiture, and restoration of gain-time.

(Emphasis supplied.)

FLORIDA ADMINISTRATIVE CODE
TITLE 33 DEPARTMENT OF CORRECTIONS
CHAPTER 33-11 MODIFICATION OF SENTENCES

33-11.0065 Incentive Gain Time.[4]

(1) Ineligibility.

(a) No inmate shall receive or accumulate incentive gain time:

1. For the minimum portion of a sentence imposed pursuant to s.775.087(2), F.S., for an offense committed on or after October 1, 1976 involving use or possession of a firearm, machine gun, or destructive device as defined in s. 775.087, F.S.;

2. For the minimum portion of a drug sentence imposed pursuant to s.893.13(1)(e), F.S. (1989), for a specified drug-related offense committed on or after June 27, 1989, but before January 1, 1994, in, on, or within 1,000 feet of a school;

3. If sentenced under s. 893.13(1)(I)1. for a specified drug-related offense committed prior to January 1, 1994 in, on, or within 200 feet of real properties, described in s. 893.13, F.S.;

4. For the period of time remaining in any treatment program placement term imposed under s. 953.11, F.S.

5. If convicted of offenses committed on or after October 1, 1995 and has 85% or less of the sentence remaining to be served.

6. If convicted of any of the following offenses committed before October 1, 1995 and has 85% or less of any sentence remaining to be served. The provisions of (1)(a)6. shall also apply to work, extra and constructive gain time for inmates

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[4] The text of the 1996 amendment is in italics. Graphics that supplement the text of subsection (2), entitled "Eligibility," have been omitted.

convicted of offenses committed between July 1, 1978 and June 14, 1983. The provisions of (1)(a)6. shall not apply to educational gain time under s. 944.801, F.S., or to meritorious or educational achievement incentive gain time.

a. Is convicted or has been previously convicted, of committing or attempting to commit sexual battery or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

b. Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery or aggravated battery, and a sex act was attempted or completed during commission of the offense;

c. Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping;

d. Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse; sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;

e. Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction; or

f. Is convicted, or has been previously convicted, of committing or attempting to commit offenses under s. 827.03, 827.071(2) or (3) or 847.0145, Florida Statutes.

g. Is convicted, or has been previously convicted, of conspiracy or solicitation to commit any offense listed in a. through f. above.

(b) An inmate shall not be eligible for incentive gain time in an amount which would cause a sentence to expire prior to

such inmate having served the minimum or mandatory minimum portion of a sentence imposed pursuant to:

1. s. 775.0823, F.S., for specified crimes committed against a law enforcement officer, state attorney, or assistant state attorney on or after January 1, 1990 but prior to January 1, 1994, or against a judge or justice of a court described in Article V of the State Constitution on or after October 1, 1990 but prior to January 1, 1994;

2. s. 775.084(4)(b), F.S., as a habitual violent felony offender for an offense committed on or after October 1, 1988;

3. s. 775.0875(1), F.S., for taking a firearm from a law enforcement officer while such officer was lawfully engaged in law enforcement duties in those instances where such offense was committed prior to January 1, 1994.

(c) An inmate shall not be eligible for incentive gain time in an amount which would cause a sentence to expire prior to such inmate having served the period of time for which the court has retained jurisdiction pursuant to s. 947.16(4), F.S.

(2) Eligibility. All other inmates not excluded in paragraph (1) or (5) of this section, including those in the custody of another agency while actively serving a Florida sentence in accordance with the Interstate Corrections Compact or designated pursuant to section 921.16(2), F.S., may be awarded incentive gain time pursuant to 33-11.0065(3).

(3) How credited. For inmates eligible to receive consideration under this section, the following procedures shall be used.

(a) Each inmate eligible for consideration for award of incentive gain time shall receive gain time evaluations based upon his institutional adjustment as reflected in evaluations from security, work and program components, if assigned. If it becomes necessary to make corrections
to the inmate's monthly security, work or program evaluations after the evaluations have already been submitted, the request for correction along with the reasons for the correction shall be

submitted in writing to the department head for approval. The approved corrections shall be submitted to the correctional probation officer or his designee who shall make the necessary changes.

1. The security evaluation is the rating of an inmate's institutional adjustment that includes evaluation of all areas of daily institutional routine with the exception of the inmate's work and program assignments. The security rating for the month shall be determined through the review of the four security behavioral objectives, while considering the inmate's capabilities. The security rating is to be determined by observations of the evaluator, notations on the inmate's Housing Officer Contact Card as referenced in Rule 33-3.0075, and information from other staff sources regarding the inmate's behavior. The employee completing the security evaluation shall not complete the inmate's performance evaluation for the same month. The following security behavioral objectives shall be considered when completing the monthly security rating:

a. Hygiene: grooming and personal cleanliness.

b. Appearance: care of issued clothing and compliance with uniform regulations.

c. Conduct: adherence to rules, regulations, procedures, and orders and respect for others.

d. Maintenance of living quarters: appearance and cleanliness of assigned living area.

2. The performance evaluation is the rating of the inmate's performance in work and program assignments. The monthly performance rating shall be determined through the review of the five performance behavioral objectives, while considering the inmate's capabilities. In a month in which an inmate has more than one full time assignment, the assignment of the longest duration shall be utilized for determining the inmate's monthly performance evaluation. In a month in which the full or half time assignments are of equal duration, the assignment closest to the end of the month shall be utilized to

determine the inmate's monthly performance evaluation. In a month in which an inmate has any half time assignments, both half time evaluations shall be completed. The half time assignment of the longest duration in both a.m. time period and the p.m. time period shall be utilized for determining the inmate's performance evaluation. In determining the work and program performance evaluation for the half time assignments, the work and program rating reflects the same rating as the two half time assignments if the ratings are the same. If the two half time ratings are different, the overall work and program evaluation shall reflect the lesser of the two ratings, except if one rating is outstanding and the other is satisfactory then the inmate's rating shall be above satisfactory. The employee completing the work or program performance evaluation shall not be the same employee completing the security evaluation. The following behavioral objectives shall be considered when evaluating the monthly work and program rating:

a. Conduct in program and work assignment: adherence to rules, regulations, procedures, and orders and demonstration of respect for others.

b. Interaction with others: degree to which inmate works and participates with others to accomplish required tasks.

c. Motivation for personal development and improvement: degree of interest displayed in improving skills and increasing capabilities.

d. Work and study habits: willingness to accomplish tasks without being prompted.

e. Constructive use of time: promptness in reporting to assigned area and effective use of time.

3. The security and performance evaluation provides the preliminary base gain time recommendation for the inmate in the following amounts. These amounts are contingent on the performance evaluations derived from work and programs and the security evaluation unless modified in accordance with rule 33-11.0065(3)(b).

a. When either evaluation is unsatisfactory, the preliminary base gain time recommendation shall be zero days.

b. When both evaluations are satisfactory, the preliminary base gain time recommendation shall be as follows:

I. An inmate convicted of an offense committed prior to 10-1-95 shall receive a preliminary base gain time recommendation of 8 days.

ii. An inmate convicted of an offense committed on or after 10-1-95 and not sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 4 days.

iii. An inmate convicted of an offense committed on or after 10-1-95 and sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 2 days.

c. When one evaluation is above satisfactory and the other is satisfactory, the preliminary base gain time recommendation shall be as follows:

I. An inmate convicted of an offense committed prior to 10-1-95 shall receive a preliminary base gain time recommendation of 12 days.

ii. An inmate convicted of an offense committed on or after 10-1-95 and not sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 6 days.

iii. An inmate convicted of an offense committed on or after 10-1-95 and sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 3 days.

d. When both evaluations are above satisfactory, the preliminary base gain time recommendation shall be as follows:

I. Inmates convicted of an offense occurring on or after 1-1-94 and prior to 10-1-95 which falls within the sentencing guidelines offense severity ranking chart (921.0012, F.S.) level

from 1 through 7 shall receive a preliminary base gain time recommendation of 22 days.

ii. Inmates convicted of an offense occurring on or after 1-1-94 and prior to 10-1-95 which falls within the sentencing guidelines offense severity chart level from 8 through 10 shall receive a preliminary base gain time recommendation of 16 days.

iii. Inmates convicted of an offense occurring prior to 1-1-94 shall receive a preliminary base gain time award of 16 days.

iv. An inmate convicted of an offense committed on or after 10-1-95 and not sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 8 days.

v. An inmate convicted of an offense committed on or after 10-1-95 and sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 4 days.

4. If an inmate has no work or program evaluation for the month the inmate shall be evaluated for the preliminary base gain time recommendation based upon the security evaluation in the following amounts unless modified in accordance with (3)(b) of this rule:

a. When the security evaluation is unsatisfactory, the preliminary base gain time recommendation shall be zero days.

b. When the security evaluation is satisfactory, the preliminary base gain time recommendation shall be as follows:

I. An inmate convicted of an offense committed prior to 10-1-95 shall receive a preliminary base gain time recommendation of 4 days.

ii. An inmate convicted of an offense committed on or after 10-1-95 and not sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 2 days.

iii. An inmate convicted of an offense committed on or after 10-1-95 and sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 1 day.

c. When the security evaluation is above satisfactory, the preliminary base gain time recommendations shall be as follows:

I. Inmates convicted of an offense occurring prior to 1-1-94 shall receive a preliminary base gain time recommendation of 8 days, unless otherwise modified in accordance with this rule.

ii. Inmates convicted of an offense occurring on or after 1-1-94 and prior to 10-1-95 which falls within the sentencing guidelines offense severity chart level from 1 through 7 shall receive a preliminary base gain time recommendation of 11 days, unless modified in accordance
with this rule.

iii. Inmates convicted of an offense occurring on or after 1-1-94 and prior to 10-1-95 which falls within the sentencing guidelines offense severity chart level from 8 through 10 shall receive a preliminary base gain time recommendation of 8 days, unless otherwise modified in accordance with this rule.

iv. An inmate convicted of an offense committed on or after 10-1-95 and not sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 4 days.

v. An inmate convicted of an offense committed on or after 10-1-95 and sentenced as a violent career criminal shall receive a preliminary base gain time recommendation of 2 days.

(b) The correctional probation officer or designee shall evaluate the security and performance ratings which reflect the inmate's institutional adjustment for the month. The final determination of an award of incentive gain time shall be determined by the correctional probation officer or designee and shall be based on the inmate's overall monthly activities.

When the correctional probation officer or designee concurs with the preliminary base gain time recommendation being applied no modification is required. The preliminary base gain time recommendation may be modified by the correctional probation officer as reflected by the inmates overall institutional adjustment and level of work and program participation for the month. The correctional probation officer or designee may modify the preliminary base gain time recommendation upward or downward from 1 to 4 days not to exceed the maximum eligible award. Any time the correctional probation officer or designee modifies the preliminary base gain time recommendation, the reason for the modification shall be noted. These modifications will be applied to the preliminary base gain time recommendation reflective of the overall rating derived from the security and performance evaluation or security evaluation alone.

Reasons for modification of the preliminary base gain time recommendation include:

1. Modification upward of 1 -- 4 days:

a. Participation in recommended programs if available;

b. Adherence to program plan;

c. Work or Program stability;

d. Program achievement.

2. Modification Downward of 1 -- 4 days:

a. Not participating in recommended programs if available;

b. Work or Program instability;

c. Not adhering to classification recommendations;

d. Assigned to work or program 14 days or less during the month.

(c) As evaluations are based on activities for the month, no inmate shall be considered as earning any incentive gain time until the month is complete, the evaluations have been submitted, and the award has been determined.

(4) When processed. Incentive gain time is to be processed at the end of each month or upon receipt of progress reports on inmates housed by other agencies. All incentive gain time awards should be posted in the Offender Based Information System by the close of business no later than the 12th of each month following the month of the award.

(a) Except in the case of extenuating circumstances, inmates will receive written notice of the monthly gain time award within three working days of the last scheduled posting date. In addition, the next scheduled progress report will reflect and summarize the awards of gain time made during the reporting period.

(b) Inmate grievances related to the gain time award or the failure to have received notice of the gain time award shall be filed pursuant to the formal grievance process no later than the end of the month the award is posted in accordance with Rule 33-29.005 for inmates in the department's custody at the end of the month. Inmates who are out to court at the end of the month shall file grievances related to the gain time award or the failure to have received notice of the gain time award pursuant to the formal grievance process no later than fifteen days from the date of return to the department's custody.

(c) An inmate who has timely filed grievances regarding the failure to have received notice of a monthly gain time award, shall file a formal grievance relating to the gain time award itself no later than fifteen days from the date of the response to the formal grievance which addressed the failure to have received notice.

(d) Grievances related to gain time awards for the months prior to the adoption of this rule shall be filed no later than August 1, 1994.

(5) Disqualifications. The following conditions will disqualify an inmate for an award of incentive gain time for the period stated.

(a) Disciplinary or court action. An inmate is not eligible to receive incentive gain time for the month in which there is an infraction of the rules of the Department or the laws of the State for which he is found guilty. Additionally, those inmates on escape status and detained by other agencies may not be awarded incentive gain time for the period of time out of custody even though lodged in another confinement facility. Any inmate who is found guilty of a disciplinary report on or after January 1, 1996 shall be eligible to earn incentive gain time as follows:

1. For disciplinary reports in which the final approved action is not confinement or loss of earned gain time or where the final recommended action is probation, pursuant to 33-22.008(3)(b), the inmate shall be eligible to earn incentive gain time the month following the month in which the disciplinary infraction occurred. However, if the inmate violates the probation and the original penalty meets the requirements of subparagraphs 1. and 2. below, the inmate is then subject to the limitations on earning incentive gain time as noted.

2. For disciplinary reports in which the final approved action is less than or equal to 30 days confinement or less than or equal to 30 days loss of earned gain time, the inmate shall not be eligible to earn incentive gain time for three consecutive months following the month in which the disciplinary infraction occurred.

3. For disciplinary reports in which the final approved action is greater than 30 days confinement or greater than 30 days loss of earned gain time, or where the inmate was convicted of an offense occurring while committed to the Department of Corrections, the inmate shall not be eligible to earn incentive gain time for six consecutive months following the month in which the disciplinary infraction or offense occurred.

4. The failure to serve the confinement imposed does not alter the ineligibility of the inmate to earn incentive gain time as noted in subparagraphs 2. and 3.

5. The ineligibility of the inmate to earn gain time as noted in subparagraphs 2. and 3. remains in effect when, due to unavailability of gain time, unearned gain time is designated as the final approved action.

(b) Inmates who are out of the department's custody during the month on escape, out to court status, or on furlough shall not be eligible to receive incentive gain time for that period of the month.

(c) Death or Life Sentences. Death or Life sentences cannot be reduced by gain time. However, any inmate serving a death or life sentence will be considered for incentive gain time and the gain time will be posted so that in the event the death or life sentence is commuted to a number of years, the accumulated incentive gain time will be applied to the inmate's sentence.

(6) Educational achievement incentive gain time. Upon notification by the education supervisor or regional education program administrator of a recommendation by the Office of Education and Job Training, the department shall apply a one time award of 60 additional days of incentive gain time to an inmate who is otherwise eligible and who has successfully completed requirements for and is awarded a general education development certificate or vocational certificate. In order to be eligible for the gain time award, the general education development certificate or vocational certificate must be issued by the Florida Department of Education or the program issuing the certificate must be approved by the Office of Education and Job Training in advance of the inmate's enrollment. Inmates assigned to community facilities who earn a general education development certificate or vocational certificate in an on site educational program operated by an outside vendor or provider (state community college, vocational technical center or private

institution) who is approved in advance by the Office of Education and Job Training shall be recommended by the regional educational program administrator for incentive gain time for educational achievement. Under no circumstances may an inmate receive more than 60 days gain time for educational attainment pursuant to this section.

(7) Educational gain time. Upon notification by the education supervisor or regional education program administrator, the department shall grant a one time award of up to 6 days of additional incentive gain time to all inmates who are otherwise eligible and who have attended and satisfactorily participated in 150 hours of functional literacy instruction. The functional literacy instruction must be provided by the Office of Education and Job Training teachers, approved staff, or volunteers.

Specific Authority 20.315, 944.09, 944.275 FS.
Law Implemented 20.315, 944.09, 944.275 FS.

IN THE SUPREME COURT OF FLORIDA

RICHARD BING GWONG,
Petitioner,

v. **CASE NO. 87,824**

HARRY K. SINGLETARY, JR., Secretary, Department of Corrections,

Respondent.
_____/

RESPONDENT'S MOTION FOR REHEARING, CLARIFICATION AND ISSUANCE OF ORDER STAYING FINALITY OF OPINION PENDING REVIEW BY UNITED STATES SUPREME COURT

Attorney General ROBERT A. BUTTERWORTH, on behalf of Respondent, HARRY K. SINGLETARY, JR., Secretary of the Florida Department of Corrections, pursuant to Florida Rules of Appellate Procedure 9.300 and 9.330, respectfully requests this Honorable Court to rehear this cause and clarify its opinion dated October 10, 1996, for the purpose of issuing an order staying finality of the opinion pending review by the United States Supreme Court. As grounds, Respondent says:

1. On October 10, 1996, this Court issued an opinion in this cause barring application of the Department of Correction's

Rule 33-11.0065 (1996), Florida Administrative Code, prohibiting certain classes of inmates from receiving incentive gain-time after the rule's effective date.

2. The Court stated that it would withhold issuance of the writ sought by Petitioner because of its confidence that the Respondent "will fully comply with the dictates of this opinion[.]" (Opinion, page 11). For the reasons stated below, Respondent seeks an order staying finality of the opinion.

3. The basis for the Court's decision in this cause was its determination that the rule as applied to Petitioner, RICHARD BING GWONG, and similarly situated inmates violated the *Ex Post Facto* Clause of the United States Constitution. In the opinion, this Court relied on *Weaver v. Graham* 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) and *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990) while rejecting Respondent's assertion that the later decisions in *California Department of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) and *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) control.

4. The United States Supreme Court has accepted review in *Lynce v. Mathis et al.*, No. 95-7452, set for oral argument November 4, 1996, involving the State of Florida's revocation of provisional credits and administrative gain-time awarded to inmates as a means of relieving prison overcrowding. This Court has upheld such revocations. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994).

5. In their briefs to the United States Supreme Court in *Lynce*, the parties set forth the question presented as follows:

A) Petitioner Lynce:

Whether the retroactive application of amended Florida penal statute § 944.277 (1992) violates the Ex Post Facto Clause of the United States Constitution by withdrawing early release credits previously awarded to petitioner under the pre-amendment version of the statute, where that withdrawal was based solely upon petitioner's 1985 offense of conviction.

B) Respondent Mathis:

Whether the retroactive application of Florida Statute § 944.277 (Supp. 1992), by withdrawing credits previously allocated petitioner for release solely to alleviate prison overcrowding, increases the punishment for petitioner's 1985 offense of conviction in violation of the Ex Post Facto Clause of the United States Constitution.

C) Respondent Butterworth:

During the years 1988-1993, when prison population reached statutorily set limits, Florida awarded inmates such as the petitioner provisional credits, a form of "gain time" intended solely to relieve prison overcrowding by reducing inmates' sentences. Between 1988 and 1991, the petitioner was given 1,860 days of provisional credits. Then, in 1992, the Florida Legislature revoked all provisional credits given to inmates like the petitioner, who

had been convicted of violent crimes. Question: whether that revocation violated the ex post facto clause of the U.S. Constitution.

6. Clearly, the significant issue raised in *Lynce* is whether the United States Supreme Court should restore reasoned consistency to the application of the *Ex Post Facto* Clause in criminal law by revisiting and receding from the court's decision in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), and its progeny. In *Weaver*, the court for the first time found that laws affecting gain-time -- a prison management tool -- would be governed by the Constitution's *ex post facto* prohibition. Traditionally, gain-time provisions were viewed as a matter of legislative and executive grace; thus modifications to those provisions were not subject to *ex post facto* scrutiny. *Harris v. Wainwright*, 376 So. 2d 855 (Fla. 1979). See also *Collins v. Youngblood*, 497 U.S. 37, 41-52, 110 S.Ct. 2715, 2719-2724, 111 L.Ed.2d. 30 (1990), for a historical analysis of the application of the *Ex Post Facto* Clause to criminal statutes.

7. This Court's decision in the instant case will be substantially affected by the outcome of *Lynce,* regarding any modifications to the *Weaver* decision and its progeny.

8. Moreover, the Attorney General, on behalf of the Respondent, will be filing a petition for writ of *certiorari* in the United States Supreme Court, seeking review of this Court's decision on federal constitutional grounds. The outcome of this case affects prison release dates for many thousands of "violent felony offenders" (Petition, page 4) as well as the safety and welfare of all Floridians. It is respectfully requested that this Court stay the effect of its decision until the United States Supreme Court further examines the constitutional question of

the relationship between the *Ex Post Facto Clause* and statutory prison management tools.

WHEREFORE, Respondent respectfully requests this Honorable Court to rehear this cause, clarify its opinion dated October 10, 1996, and issue an order staying finality of the opinion pending review by the United States Supreme Court

Respectfully submitted this 22nd day of October, 1996.

ROBERT A. BUTTERWORTH
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(2)

Case No. 96-958

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,
Petitioner,

v.

RICHARD BING GWONG,
Respondent.

RESPONSE TO PETITION FOR CERTIORARI

Indigent Respondent

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AS TO THE PETITIONER'S STATEMENT OF THE CASE

The petition for writ of certiorari fails to put the issue in this case in accurate and proper context. Missing from the petition is the important course of events regarding just how the Florida Department of Corrections ("the department"), which has been affording inmates the ability to earn incentive gain time per the provisions of section 944.275(4)(b), Fla. Stat. (1985) for more than twenty years, suddenly stopped doing so. The department's action was not taken based upon authority granted to it by the Florida Legislature -- on the contrary it did so in contravention of the Legislature. The department proceeded solely upon a flawed opinion issued by the attorney general of Florida -- an opinion specifically disapproved by the Florida Supreme Court in **Gwong v. Singletary**, ___ So. 2nd ___ (21 Fla. L, Weekly, S430, Fla. October 10, 1996). (See the Petition for Writ of Certiorari, Appendix, A-10.) In this regard, we note the following:

Mr. Gwong is a Florida prisoner serving a 22 year prison sentence for second degree murder committed on January 13, 1987. He was sentenced on February 24, 1989 in Pinellas County, Florida Circuit Court Case No. 87-529-CF. He has not yet served 85% of the sentence. (The Petition for Writ of Certiorari, Appendix, A-2.)

On January 13, 1987, the date of the commission of the

Mr. Gwong's crime, section 944.275, Florida Statutes (1985), provided in part that Gwong was eligible to earn what is called "incentive gain time" as follows:

> "(4)(b) For each month a prisoner works diligently ...the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly."

(Petitioner's Appendix to Petition for Certiorari, at A-2.)

On October 1, 1995, Florida's "85%" law went into effect. That law requires all prisoners to serve at least 85% of their sentences regardless of any other statutory provision which might enable an inmate to serve less than that percentage. However, the 1995 statute was expressly limited to "sentences imposed for offenses committed on or after October 1, 1995." See s. 2, Ch. 95-294, Laws of Florida (1995), §944.275(4)(b)(3), Fla. Stat. (1995), emphasis supplied. This is important because it demonstrates that the Florida Legislature, respecting the *Ex Post Facto* clause of the United States Constitution, took pains to comply with it and make the new law apply prospectively only.

On March 20, 1996, the Florida attorney general acting unilaterally and contrary to the prospective application of the Florida Legislature's "85% law," issued AGO Opinion 96-22, which provided that the "85% law" could be applied to violent and sex offenders who committed their crimes before October 1, 1995 as well and concluded,

> "that the department could exercise its 'dis-

cretion' under the statute by adopting a rule that prohibited certain classes of inmates from receiving incentive gain-time."

(See the Petition for Writ of Certiorari, Appendix, A-3, quoting the Supreme Court of Florida in **Gwong v. Singletary**, supra.)

Acting on the attorney general's opinion, on April 21, 1996, the department adopted Fla. Admim. Code Rule 33-11.0065 (1996), which had the effect of making Gwong and others similarly situated ineligible to earn incentive gain time after that date if they had 85% or less of any sentence remaining to be served. That rule provided in part:

"Rule 33-11.0065 Incentive Gain Time

(1) Ineligibility

(a) No inmate shall receive or accumulate gain time:

* * * * *

6. If convicted of any of the following offenses committed before October 1, 1995 and has 85% or less of any sentence remaining to be served. The provisions of (1) (a) 6. shall also apply to work, extra, and constructive gain time for inmates convicted of offenses committed between July 1, 1978 and June 14, 1983."

(See the Petition for Writ of Certiorari, Appendix, A-3.) This is followed by an enumeration of offenses which make violent/sex inmate ineligible to "...receive or accumulate (incentive) gain-time" and includes violent and sex offenders. (Id.) Based upon the new rule, effective April

21, 1996 the department illegally denied Mr. Gwong and other similarly situated prisoners eligibility to earn up to 20 days per month of incentive (work) gain time.

Gwong challenged the rule by filing a petition for writ of mandamus in the Florida Supreme Court. On October 10, 1996, that court ruled unanimously in part that:

> "Given that the amendment (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of certain inmates to earn incentive gain-time credits, we are compelled to conclude that it violates the ex post facto prohibition."

(See Petition for Writ of Certiorari, Appendix, at A-10.)

On October 22, 1996, the attorney general filed a motion for rehearing, clarification and issuance of order staying finality of the opinion pending review by this court. A copy of the motion is found in petitioner's Appendix to the Certiorari Petition at A-32-36. On November 22, 1996 the Supreme Court of Florida denied the motion. (Petitioner for Writ of Certiorari, Appendix, at A-12-15.) On or about October 22, 1996, the attorney general of Florida filed a petition for certiorari and application for a stay of the finality of the Supreme Court of Florida's decision in **Gwong**, supra, in this court. Thereafter, this honorable court denied the attorney general's application for a stay.

REASONS FOR DENYING THE PETITION AND NOT ISSUING THE WRIT

Review should not be granted because there is no

> conflict between this court's most recent decisions and the decision below in **Gwong v. Singletary**. Furthermore Florida's incentive gain time statute, section 944.275, Fla. Stat. (1985), is not a "purely discretionary" statute. Finally, there is no confusion or tension in Florida between ex post facto limitations and the right of this state to manage its prisons.

This Very Same Issue Has Been Decided By This Honorable Court Previously.

The Florida attorney general fails to advise that this same issue came on for requested review via a petition for writ certiorari in 1989. The request was denied. Thus, in **Raske v. Martinez**, 876 F.2d 1496 (11th Cir. 1989), the United States Eleventh Circuit Court of Appeals, reviewing exactly the same Florida statute (section 944.275[4][b], Fla. Stat.) and exactly the same issue as in the case at bar -- determined that the *Ex Post Facto* clause of the United States Constitution clearly prohibited Florida from enacting a statute which had the effect of a retroactive reduction in the ability of a Florida prisoner to earn incentive gain time. The **Raske** court addressed in great detail the petitioner's claim that incentive gain time is "purely discretionary" (the certiorari petition, page 4) holding:

> "We agree, of course, that incentive gain time is discretionary. We note however, that this discretion is not complete. Thus, for example, the State does not contend that a prisoner who has performed his work in an outstanding manner can legally be denied incentive gain time for that work, despite its so-called "discretionary" nature.

See Pettway v. Wainwright, 450 So.2d 1279 (Fla. 1st DCA 1984)."

Raske, supra, 876 F.2d at 1499. (Emphasis supplied.) The **Raske** court added at 876 F. 2d 1499:

> "We see no fundamental distinction between the conditions that a prisoner must satisfy to receive basic gain time and the conditions that a prisoner must satisfy to earn discretionary gain time. In both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time. We therefore reject the State's attempt to distinguish the 1983 act from the 1978 act at issue in Weaver by a supposed distinction between the nature of basic and incentive gain time."*

(Emphasis supplied.)

The Supreme Court of the United States denied certiorari in **Raske** on December 4, 1989. See **Raske v. Martinez**, supra, 110 S. Ct. 543, 493 U. S. 993, 107 L. Ed. 2nd 540.

The Decision Of The Supreme Court Of Florida Is Proper And Consistent With The Laws Of This State.

In the case at bar, Florida's unconstitutional conduct is even worse because as Justice Overton writing for a unanimous Florida Supreme Court noted a state may not do by administrative rule that which it cannot do by statute. Specifically, Justice Overton wrote:

"By amending the rule, the department seeks to do

---

* Thus petitioner's claim that this honorable court held in **Weaver v. Graham**, 450 U.S. 24,35 (1981) that Florida's incentive gain time statute, section 944.275, Fla. Stat. (1985), is "purely discretionary" is incorrect. This honorable court did not have the incentive gain time statute before it in **Weaver** -- and the comment is dicta.

what the legislature cannot even though the department itself is created by the legislature and acts in a quasi-legislative capacity. **As the department conceded at oral argument, if the legislature had passed a statute retrospectively eliminating Gwong's eligibility for incentive gain-time, the statute would violate the ex post facto clause.** Simply because the amendment is an administrative regulation rather than a law does not alter the application of the ex post facto clause. Such an argument fails to 'acknowledge that it is the effect, not the form, of the law that determines whether it is ex post facto.' Weaver, 450 U.S. at 31."

(The Petition for Certiorari, Appendix, A-10, emphasis supplied.)

As To Petitioner's Claim That The **Gwong** Decision Conflicts With **Weaver v. Graham, Collins v. Youngblood** And **California** Dept. of Corrections v. Morales Is Incorrect.

The Supreme Court of Florida took great pains to consider, analyze and scrupulously follow **Weaver v. Graham,** 450 U. S. 24 (1981) -- as well as **Collins v. Youngblood,** 497 U.S. 37 (1989) and **California Department of Corrections** v. **Morales,** ___ U.S. ___, 115 S. Ct. 1597 (1995) -- to the extent that those decisions modified **Weaver** -- in the course of arriving at its decision in **Gwong.** In this regard, the Florida Supreme Court first noted (See the Petition for Certiorari, Appendix, at A-5):

"In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which

a crime is punishable. California Dep't of Corrections v. Morales, 115 S. Ct. 1597, 131 L. Ed. 2d. 588 (1995)."

This recitation of the test for determining whether state action runs afoul of the *Ex Post Facto* clause is entirely consistent with the decisions of this court in **Morales** and **Collins.**

The Florida Supreme Court then applied the holdings in those cases to the situation in the case at bar noting (see the Petition for Certiorari, Appendix, A 5,6):

> "In applying this test to the instant case, we are presented with nearly the identical situation we evaluated in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). In Waldrup, the prisoner had been sentenced for crimes committed in 1980 and 1982. In 1983, the legislature amended section 944.275 to decrease the possible award of incentive gain-time, which, in turn, had the effect of possibly increasing the prisoner's sentence. We first concluded that the change in the statute operated retrospectively because it applied to a large class of inmates whose offenses occurred before its effective date. Under the second prong, we concluded that the statute was ex post facto because it was more onerous than the law in effect on the date of the offense. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981). This was true even though a prisoner had but a 'mere expectancy' in the availability of incentive gain-time. 450 U.S. at 30 (a law need not impair a "vested right" to violate the ex post facto prohibition; it need only make the punishment more onerous than the law in effect at the time the offense was committed). This is because 'a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' 450 U.S. at 32. Like the situation in both Waldrup and Weaver, the instant rule amendment (1) applies to a class of inmates who committed their offenses before the amendment's

effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of an inmate to earn incentive gain-time credits."

Furthermore, the Florida Supreme Court recognized the extent to which this court's decision in **Weaver** was modified by **Collins and Youngblood**, stating (see the Petition for Certiorari, Appendix, at A-6,7):

> "In comparing the instant case to Waldrup and Weaver, we note that the United States Supreme Court has somewhat altered the second prong from how it was set forth in those cases. See Morales; Collins v. Youngblood, 497 U.S. 37, 100 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). In Weaver, the Court concluded that a law violated the ex post facto clause if it retrospectively "disadvantaged" a prisoner. In Waldrup, we applied this same terminology. **In Collins, however, the United States Supreme Court stated that a law is ex post facto if it punishes as a crime an act previously committed which was innocent when done, makes more burdensome the punishment for a crime after its commission, or deprives one charged with crime of any defenses available according to the law at the time the act was committed. In Morales, the Court subsequently concluded that a law must do more than simply 'disadvantage' an inmate to violate the ex post facto clause. The Court stated that a law violates the ex post facto clause if it (1) operates retrospectively and (2) alters the definition of criminal conduct or increases the penalty by which a crime is punishable as set forth in Collins. Morales, 115 S. Ct. at 1602 n. 3. The Court noted, however, that, in situations like those at issue in Weaver, the clause was violated because the new law enhanced the measure of punishment by altering the available gain-time. Id. at 1601-02. Likewise, the rule amendment in the instant case, as did the statute in Waldrup, retrospectively enhances the measure of punishment by altering the available gain-time."**

(Emphasis supplied.) Finally, the Florida Supreme Court

recognized that the facts in the case at bar are entirely different than those in **Morales**. Thus this state's highest court noted:

> "Further, the facts of the instant case are distinguishable from those in Paschal and Morales. In those cases, it was determined that the parole procedures could be amended because they merely altered the method to be followed in fixing a parole date. **Here, the procedure for implementing the award of gain-time has not merely been altered; it has been changed to completely eliminate the ability of certain classes of inmates to receive gain-time even if they carry out their work in an outstanding manner as provided by the statute.**"

(See the Petition for Certiorari, Appendix, A-9, emphasis supplied.)

Thus, the attorney general's contention that the Florida Supreme Court, in conducting its ex post facto analysis, relied upon the "disadvantaged offender" test applied in **Weaver** but modified by this Court in **California Dept. of Corrections v. Morales**, __ U. S. ___, 115 S. Ct. 1597, 1602, n. 3 (1995) -- is incorrect and a misrepresentation of the meticulous extent to which the Florida Supreme Court applied this court's decisions in **Weaver**, **Morales** and **Collins** to the facts in the case at bar.

This Honorable Court Should Give Due Deference To the Supreme Court of Florida's Decision In **Gwong**.

In **Mullaney v, Wilber**, 421 U. S. 684,691 (1975), it was noted that "(t)his court repeatedly has held that state

courts are the ultimate expositors of state law (citation omitted) and that we are bound by their constructions except in extreme circumstances..." In **Waldrup v. Dugger**, 562 So. 2nd 687 (Fla. 1990), the Florida Supreme Court carefully analyzed Florida's incentive gain time statute, section 944.275, Fla. Stat. (1985) in terms of the word "may," the amount of discretion the department had under that statute and the context of prevailing decisions of this court. The court said in this regard at 562 So.2d 692:

> "The state argues that this does not render the law ex post facto, since the availability of incentive gain-time is nothing but a 'mere expectancy' dependent entirely on the discretion of DOC. Be that as it may, we are forced to conclude that the 1983 amendment renders the statute ex post facto because it actually disadvantages Waldrup within the meaning of the relevant case law.
>
> Indeed, the argument advanced by the state sounds very much like the discredited analysis employed by this court in Harris v. Wainwright, 376 So.2d 855 (Fla. 1979). In Harris we had denied relief after an inmate was subjected to a retroactive gain-time statute that had reduced the maximum number of gain-time days that could be awarded to him. We held that
>
> > gain-time allowance is an act of grace rather than a vested right and may be withdrawn, modified or denied.
>
> Harris, 676 So. at 856.
>
> The United States Supreme Court in Weaver directly overruled Harris finding that [c]ontrary to the reasoning of the supreme court of Florida, a law need not impair a vested right to violate the ex post facto provision.... Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair

notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Weaver, 450 U.S. at 29-31, 101 S.Ct. at 964-65. The Weaver Court went on to reject the state's argument that an alteration in gain-time was not actually an alteration in sentence. Gain-time, held the Weaver Court, "is one determination of petitioner's prison term." Id. at 32, 101 S.Ct. at 966. In conclusion, the Weaver Court found the retroactive gain-time statute void to the extent that it "reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks." Id. at 33, 101 S.Ct. at 967.

It could not be clearer that the analysis in Weaver applies as fully to discretionary gain-time as it does to "mandatory" gain-time, if the latter has ever truly existed in Florida. The Eleventh Circuit has reached this conclusion in a recent case raising exactly the issue before this Court today. Raske, 876 F.2d at 1499-1500. We agree with the Eleventh Circuit's analysis in Raske. Even the "grace" of the legislature, once given, cannot be rescinded retrospectively. Id. The Weaver opinion makes it plain that the ex post facto clause applies with equal vigor to a retroactive reduction in DOC's discretion to grant gain-time. Such plainly is the case before us today.

Accordingly, upon this opinion becoming final, DOC shall be barred from applying the 1983 reduction in incentive gain-time to inmates convicted of offenses occurring before the effective date of the 1983 act. As to Waldrup and similarly situated inmates the effect of this holding is two-fold: To reinstate the incentive gain-time statutes in force at the time of offense and to declare unconstitutional the 1983 incentive gain-time revisions as

applied to these inmates. DOC thus shall recompute incentive gain-time for Waldrup and similarly situated inmates based on the formulas, and in light of the criteria, contained in the pre-1983 statute."

Waldrup v. Dugger, 562 So.2d at 692, emphasis supplied.

Thus, with regard to the interpretation of the incentive gain time statute in general and the meaning of the word "may" contained therein, the Florida Supreme Court has determined that under the language of section 944.275(4)(b), Fla. Stat. (1985), while the department retains the discretion to determine how much incentive gain time an inmate earns each month, it does not have the power to reduce the pool of inmates who were eligible to receive same each month. The **Waldrup** opinion is consistent with **Raske v. Martinez**, 876 F.2d 1496 (11th Cir. 1989) which preceded it and the **Gwong** decision which followed and which is discussed in detail above. We believe that deference to the state court is appropriate from the Supreme Court of the United States regarding the statutory interpretation of section 944.275(4)(b), Fla. Stat. (1985) under these circumstances.

The Claim That Florida Will Be Irreparably Harmed By The Release of Inmates Convicted of Violent Crimes And Sex Offenses If The Writ Is Not Issued Is Incorrect.

The petitioner's claim that nullification of the Florida Supreme Court's October 10, 1996 decision in **Gwong** is necessary to avoid irreparable harm to this state is just false. There are more than 66,000 inmates in the Florida prison system most of whom are not affected by the **Gwong**

decision. (Gwong's Appendix to Response to Application for Stay, A-1.) By the very nature of their crimes and finite sentences, scores of violent and sex offenders necessarily expire their sentences and are released every day. (Gwong's Appendix to his Response to Application for Stay, A-2,3.) As noted above, Florida has by statute allowed violent and sex offenders to earn incentive gain time and thereby reduce the amount of time they will be incarcerated for more than two decades -- despite the belated contention made here that the department could have stopped this practice at any time by merely adopting a rule to that effect. Admittedly, some of the 22,000 prisoners whose ability to earn incentive gain time was unconstitutionally interfered with on April 21, 1996 have been and will continue to be released as they expire their respective sentences in part by accumulating work gain time -- but that is as it should be. It would be a travesty of justice if Florida could continue to deny these persons their constitutional right not to be illegally imprisoned. A state which falsely imprisons a citizen beyond his or her termination of incarceration date is a police state.

The Florida Supreme Court, carefully adhering to this court's decisions in **Weaver**, **Morales** and **Collins**, found that eliminating Gwong's ability to earn incentive gain time did not just "disadvantage" him in some speculative or nebulous way. Instead it quantifiably produced an actual increase in the period of incarceration attached to the

covered crimes because it prevented him from reducing the actual time he must remain in prison by up to 20 days per month. See §944.275(4)(b), Fla. Stat. (1985). That reasoned and respectful decision should not be disturbed.

As To The Petitioner's Claim That A Decision In This Case Should Be Governed by This Court's Pending Decision In **Lynce v. Mathis**.

Finally, we address the petitioner's claim (see the Petition for Certiorari, Appendix, A-32-36) that this court's anticipated decision in **Lynce v. Mathis**, United States Supreme Court Case No. 95-7452, "...might be dispositive of the issues in the instant case." (The Application for Stay, page 2.) This argument demonstrates the way in which the petitioner has manipulated the issue to suit itself even when doing so results in duplicity. The issue in **Lynce** does not involve incentive gain time. Instead it involves "...the State of Florida's revocation of provisional credits and administrative gain-time awarded to inmates as a means of relieving prison overcrowding." (The Petition for Certiorari, Appendix, A-33) The Department suggests that there is a distinct similarity of the issues in Gwong and Lynce. (The Petition for Certiorari, Appendix, A-33,34.) The department made **the exact opposite argument** to the this court during the course of the **Lynce v. Mathis** litigation -- claiming instead that incentive gain time (the subject matter in **Gwong**) and provisional credits (the subject matter in **Lynce**) are completely different in all respects -- especially in

terms of the applicability of the *ex post facto* clause.

Thus in its answer to Lynce's habeas corpus petition filed in the United States District Court for the Middle District of Florida, Orlando Division, the department stated emphatically:

> "Petitioner apparently believes that early release credits are the equivalent to the basic gaintime addressed in Weaver v. Graham, 450 U. S. at 24 **and the incentive gaintime addressed in Raske v. Martinez, 876 F. 2nd 1496 (11th Cir. 1989) and Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). However, the similarities are limited to the nomenclature. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon the length of the term meted out.** Basic gaintime is applied as a lump sum award to reduce the over all length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is ar (sic) quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in Weaver, may operate as a 'factor... [in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' **Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of 'gaintime' operate in tandem with the length of sentences imposed, they affect the 'quantum of punishment' which attaches at the time the crime is committed."**

(See the Joint Appendix in **Lynce v. Mathis**, ___ U. S. ___, Case No. 95-7452, pages 42,44, emphasis added.) In other words, in its answer to the *habeas corpus* petition in the Middle District of Florida in **Lynce**, the department admitted that Florida's basic and incentive gain time statutes are

substantive, quantifiable parts of the quantum of punishment and therefore subject to the *Ex Post Facto* Clause of the United States Constitution. Provisional credits on the other hand (according to the department) are distinguishable because they are merely procedural mechanisms to manage prison overcrowding -- and therefore not the subject matter of *Ex Post Facto* analysis. Thus the department added:

> "Conversely, the eligibility and receipt by a prisoner of early release awards, whether those awards are called 'gaintime', 'credits', 'allotments', etc., is in no way tied to overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate punishment meted out. The sole purpose of the early release statues is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. The statutes are procedural in nature -- their purpose directed to alleviating the administrative crisis of prison overcrowding not to the traditional purposes of punishment. Consequently, Florida's early release statutes create no 'substantial personal rights' relating directly to the definition of crimes, defense or punishment, as defined and limited by the Supreme Court's decision in Youngblood.

(The Joint Appendix in **Lynce v. Mathis**, supra, pages 45, 46, emphasis supplied.)

CONCLUSION

For the reasons set out above, this honorable court is requested to deny the petition for certiorari.

Respectfully Submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,
Petitioner,

v.

RICHARD BING GWONG,
Respondent.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been provided counsel for petitioner, Hon. Marty E. Moore, Deputy General Counsel, the Office of the Attorney General of Florida, The Capital Building, Plaza Level One, Tallahassee, Florida 32399-1050, by United States mail delivery, this 3rd day of ~~January~~ February, 1997.

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